

Comments of

STERLING SUFFOLK RACECOURSE, LLC

on

Draft National Pollutant Discharge Elimination System (NPDES) Permit

No. MA0040282

Proposed by EPA New England - Region 1

and

Massachusetts Department of Environmental Protection

Public Notice No. MA-006-13

March 30, 2013

INTRODUCTION

By joint Public Notice No. MA-006-13 dated March 1, 2013, EPA Region 1 and the Massachusetts Department of Environmental Protection issued a draft NPDES permit, No. MA0040282, for the stables and portions of the racetrack known as Suffolk Downs, in East Boston and Revere, Massachusetts. The permittee, Sterling Suffolk Racecourse, LLC, operates Suffolk Downs. Sterling Suffolk Racecourse, LLC offers these comments in response to Public Notice No. MA-006-13.

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1. Comments on Process

1.1. Documents Reviewed

Suffolk Downs's comments on draft NPDES Permit No. MA0040282 are based on its review of the only documents contained so far in the administrative record, which Suffolk Downs understands includes the following:

Suffolk Downs, NPDES Permit Application (Sept. 29, 2008)

MassDEP, Antidegradation Review and Determination, NPDES Permit Number MA0040282 (Sept. 24, 2012)

Draft NPDES Permit No. MA0040282 (Feb. 14, 2013)

Fact Sheet, Draft NPDES Permit No. MA0040282 (Feb. 26, 2013), with attachments

Letter, David M. Webster (EPA) to John Rizzo (Suffolk Downs) re: Draft Public Notice (Feb. 27, 2013)

Letter, David M. Webster (EPA) to David Ferris (Mass DEP) re: Draft NPDES Permit No. MA0040282 (Feb. 27, 2013)

Joint Public Notice (Mar. 1, 2013)

Suffolk Downs has assigned numerical identifiers for each comment as to which Suffolk Downs believes Region and Mass DEP 1 should respond pursuant to 40 C.F.R. § 124.17 and 314 C.M.R. § 2.09. Each of the enumerated comments is significant to the purposes and objectives of the cited regulations. Some of the enumerated comments present more than one issue to which the Agencies should respond. See *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 79 (1st Cir. 1993).

1.2. Terminology in These Comments

Specialized terms and citations used in these comments are listed below:

Term	Definition
Agencies	EPA Region 1 – New England and the Massachusetts Department of Environmental Protection
Appendix	Suffolk's appendix of exhibits referenced in these comments, filed herewith
ARD	Antidegradation Review and Determination, NPDES Permit No. MA0040282 (Sept. 24, 2012)
BMP	Best Management Practices, as the Draft Permit defines the term
BOD ₅	Five-day biochemical oxygen demand
CAFO	Concentrated Animal Feeding Operation

Consent Decree	The consent decree in <i>U.S. v. Sterling Suffolk Racecourse, LLC</i> , Civil Action No. 12-11556 (lodged on Aug. 22, 2012, effective Sept. 27, 2012; found in Appendix, Exhibit 1)
CWA	The federal Clean Water Act, 33 U.S.C. § 1251 <i>et seq.</i>
Draft Permit	The draft of NPDES Permit No. MA0040282
EPA	U.S. Environmental Protection Agency
Fact Sheet	Fact Sheet for Draft Permit dated February 26, 2013
Joint Public Notice	The joint public notice of the Draft Permit, dated Mar. 1, 2013
MassDCR	Massachusetts Department of Conservation and Recreation
MassDEP	Massachusetts Department of Environmental Protection
Mass. WQS or WQS	Massachusetts Water Quality Standards, 314 CMR 4.00 <i>et seq.</i>
MCZM	Massachusetts Office of Coastal Zone Management
MSGP	Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (as modified, effective May 27, 2009)
MWRA	Massachusetts Water Resources Authority
NELG	National Effluent Limitation Guidelines for Large Horse CAFOs, 40 CFR § 412, subpart A.
Non-Production Area	The area shown as the “Non-Production Area” in Figure 1 to the Draft Permit
NSMP	Nutrient & Stormwater Management Plan prepared for Suffolk Downs, August 2012 (Fact Sheet, Attachment 1)
ORW	Outstanding Resource Water, as that term is defined in 314 CMR 4.06(1)(d)(2)
Production Area	The area shown as the “Production Area” in Figure 1 to the Draft Permit
Region 1 (or Region)	EPA New England – Region 1
Storage Pond	Suffolk’s holding pond for process wastewater, depicted on Figure 1 to the Draft Permit
Suffolk Downs (or Suffolk)	Sterling Suffolk Racecourse, LLC, the owner of the Suffolk Downs stables and racetrack
TSS	Total Suspended Solids

1.3. EPA and MassDEP as Intended Recipients of These Comments

The Draft Permit states that it will be issued jointly by EPA under the federal CWA and by MassDEP under the Massachusetts Clean Waters Act, each pursuant to its respective permitting authorities. Under the Commonwealth's permitting procedures, 314 CMR 2.09, MassDEP is required to respond to comments on the Draft Permit. Accordingly, Suffolk Downs directs these comments to both EPA and MassDEP.

1.4. MassDEP Fact Sheet or Statement of Basis

Under the Commonwealth's permitting procedures, 314 CMR 2.05, MassDEP is required to prepare and issue a fact sheet or statement of basis for every draft surface water discharge permit. Because the Fact Sheet states that both EPA and MassDEP are proposing the Draft Permit, Suffolk Downs understands that the Fact Sheet is on behalf of both EPA and MassDEP.

1.5. Comments to MCZM

The Massachusetts Office of Coastal Zone Management must certify that the final Permit is consistent with MCZM's enforceable policies under the Coastal Zone Management Act. Although MCZM has not requested comments on whether the Draft Permit is consistent with MCZM's enforceable policies, Suffolk Downs directs to MCZM all of the enclosed comments for MCZM's consideration in making its determination under the Act.

MCZM's enforceable policies at 301 CMR 21 include Water Quality Policy #1, which includes ensuring "that point-source discharges in or affecting the coastal zone are consistent with federally-approved state effluent limitations and water quality standards." 301 CMR 21.98(3). For the reasons stated in these comments, issuing Suffolk Downs a NPDES permit as modified in accordance with Suffolk Downs's comments will be consistent with state effluent limitations and water quality standards.

1.6. Reservation of Rights

Suffolk Downs reserves the right to supplement these comments with any additional information that it has not had adequate opportunity to develop during the comment period, and with any new information or data that may arise concerning the proposed receiving water, Sales Creek. (For example, as of the date of these comments, MassDEP has not timely produced in accordance with the Commonwealth's public-records laws certain records pertaining to the status and classification of Sales Creek, and the issuance of prior surface-water discharge permits pertaining to the Creek. See Affidavit of Amanda LaPorta (Appendix, Exhibit 2). Additionally, Suffolk Downs reserves the right to respond to any comments or materials that the Agencies receive during the public comment period or as the Agencies may allow thereafter. The Agencies should give full attention to such later comments and information as if Suffolk Downs had submitted them along with these comments. Suffolk Downs further reserves the right to request a public hearing in light of any later-developed information or data.

1.7. The Agencies Should Ask for Any Additional Technical Information They Need

Suffolk Downs requests that if the Agencies, upon reviewing these and any other comments, find that they need more information to complete their review, the Agencies identify the missing information and provide an opportunity for additional comment. Suffolk Downs will supply promptly whatever information it reasonably can.

2. Comments on the Fact Sheet

2.1. The Fact Sheet Incorrectly Characterizes Sales Creek and Applicable Water Quality Standards

Page 1 of the Fact Sheet identifies the "Receiving Water" as "Sales Creek; State Basin

Code MA-70-10,” which the Fact Sheet further lists as having a “Class SA/ORW” classification under the Mass. WQS. Under 314 CMR 4.05(4)(a), a “Class SA” water is a “Coastal and Marine”-class water. 314 CMR 4.02 defines “Coastal and Marine Waters” as “The Atlantic Ocean and all contiguous saline bays, inlets and harbors within the jurisdiction of the Commonwealth including areas where fresh and salt waters mix and tidal effects are evident or any partially enclosed coastal body of water where the tide meets the current of a stream or river.”

Both the asserted Basin Code for and the classification of Sales Creek are incorrect. The Fact Sheet’s misidentification of the Receiving Water may be the result of both an incorrect understanding of Sales Creek’s geography and hydrology as it passes through the Suffolk Downs property and a misinterpretation of a MassDEP list.

2.1.1. The Fact Sheet Incorrectly Describes Sales Creek As It Passes Through the Suffolk Downs Property

The Fact Sheet begins by noting that Sales Creek bisects the Suffolk Downs property, entering the property through a culvert, entering another culvert before surfacing in the infield of the racetrack, and entering another culvert before draining east of Bennington Avenue.¹ The Fact Sheet asserts that Sales Creek drains into Belle Isle Inlet, which the Fact Sheet mentions is designated as an ORW. The Fact Sheet asserts that Sales Creek is “tidally connected to Belle Isle Inlet,” although the Fact Sheet also mentions that a tidal gate, the “Bennington Street tandem tidal gate,” “shuts out incoming tidal surges but allows Sales Creek runoff to flow into Belle Isle Inlet unimpeded.” At page 18 of the Fact Sheet, however, the Fact Sheet quotes MassDEP materials that acknowledge that the tide gate prevents Sales Creek upstream of the tide gate from functioning as a tidal system.

The latter characterization is correct. The tide gate blocks *all* tidal flows, not just “tidal surges.” When the tide does not reach the tide gate, Sales Creek flows into Belle Isle Inlet unimpeded. When the tide reaches the gate and exceeds the upstream water level, the gate shuts. At that point, all of Sales Creek’s flows remain behind the gate unless pumped to Belle Isle Inlet via the MassDCR Bennington Street pump station. See Affidavit of Sean Reardon (Appendix, Exhibit 4).

Sales Creek thus is not “tidally connected” to Belle Isle Inlet upstream of the Bennington Street tidal gate. Upstream of the gate, no part of the Atlantic Ocean, and no part of any contiguous “saline bay, inlet or harbor,” enters Sales Creek. Upstream of the Bennington Street gate, there is no area (in the words of the Mass. WQS) “where fresh and salt waters mix and tidal effects are evident or any partially enclosed coastal body of water where the tide meets the current of a stream or river.” The tide does not meet the waters of Sales Creek until those waters are downstream of the Bennington Street gate.

¹ Page 4 of the Fact Sheet states that the existing Sales Creek culverts within the boundaries of Suffolk Downs were completed in 1982. That statement is incorrect: both culverts, which are owned by MassDCR, were rebuilt in 2005. See Excerpts, Massachusetts Department of Conservation & Recreation, Notice of Intent, Restoration of Sales Creek Discharge System (June 2005) (Appendix, Exhibit 3).

2.1.2. The Fact Sheet Incorrectly Interprets Table 15 of 314 CMR 4.06 (Tables and Figures)

The Fact Sheet appears to base its designation of Sales Creek upon Table 15 to 314 CMR 4.06. Table 15 designates various waterbodies within the “Boston Harbor Drainage Area” for purposes of the Mass. WQS. The notes for Table 15 state that “Belle Isle Inlet and all tributaries thereto” are Class SA and ORW. Table 15 does not explain what it means by a “tributary” to Belle Isle Inlet. The Mass. WQS does not explain what “tributary” means in this context either.² The evidence suggests that the drafters of Table 15 did not mean to include within the scope of “tributaries to Belle Isle Inlet” those portions of Sales Creek that are upstream of the Bennington Street gate. That evidence is as follows:

- The Belle Isle Inlet tributaries to which Table 15 refers are “Class SA” waters. As shown in Comment 2.1.1, upstream of the Bennington Street gate, Sales Creek has no coastal or marine characteristics. Under 314 CMR 4.02, “[a]ny surface water not subject to tidal action or not subject to the mixing of fresh and ocean waters” is an “Inland Water or Fresh Waters.” In its Tables and Figures accompanying 314 CMR 4.06, where MassDEP designates a waterway that has both “coastal” and “inland” portions, it does so expressly. See, for example, Table 15’s descriptions for Weymouth Back River and Weir River, Table 20’s description for Plumbush Creek, and Table 21’s designations for Eagle Hill River, Third Creek, Roger Island River, Rowley River, Egypt River, Mud Creek, Pine Island Creek, Little Pine Island Creek, and Jericho Creek.
- The Fact Sheet asserts that Sales Creek has State Basin Code MA-70-10. According to MassDEP’s *Massachusetts 2012 List of Integrated List of Waters* (Jan. 2012) (“*MassDEP 2012 List*,” Appendix, Exhibit 5), Basin MA-70-10 is for an area of Boston Harbor “From the tidal flats at Coleridge Street, Boston (East Boston) to a line between Logan International Airport and Point Shirley, Boston/Winthrop.” *Id.* at 108.³ The *MassDEP 2012 List* denotes “Sales Creek” as Basin MA-71-12, and describes Sales Creek as follows: “Headwaters near Route 145, Revere to tidegate/confluence with Belle Isle Inlet, Boston/Revere.” *Id.* at 67.⁴ The drainage area attributed to the “upstream” portion of Sales Creek is 0.008 square miles, the identical area reported in the Fact Sheet. See *id.*
- In April 1998, the Agencies issued to Global REVCO Terminal, LLC, located in Revere, a NPDES permit (NPDES Permit No. MA0003298⁵) allowing stormwater discharges into Sales Creek. The Agencies renewed that permit in 2005.⁶

² 314 CMR 4.06(7) contains a definition of “Tributaries” that pertains only to Class A public water supplies.

³ The same report lists Winthrop Bay as a “Category 5” water that needs a Total Maximum Daily Load Limit for bacteria and PCBs. See *id.* The Draft Permit does not impose any related requirements.

⁴ The report lists Sales Creek as being a “Category 3” water, whose uses have not been assessed. See *id.* The Draft Permit’s conditions are consistent with Sales Creek being a “Category 3” water.

⁵ All referenced Massachusetts NPDES permits and supporting materials are available through Region 1’s website, www.epa.gov/region1/npdes/mass.html.

⁶ Global REVCO’s permit expired in June 2010. Region 1’s website does not indicate whether Global REVCO applied for renewal of its permit.

Suffolk Downs has reviewed EPA's files pertaining to the Global REVCO permit, and has found no suggestion that either Agency ever considered in connection with Global REVCO Sales Creek to be a "tributary" of Belle Isle Inlet for purposes of the latter's Class SA/ORW designation. See Appendix, Exhibit 2; see also Fact Sheet, NPDES Permit No. MA0003298, 4 (2005) (recognizing that Sales Creek eventually flows into Belle Isle Marsh "and from there into Winthrop Harbor...a Class SB water body"); *id.* at 10 (noting same designation); *id.* at 11 (noting that proposed renewal of permit "is not being considered in isolation," but rather in the context of "all potential direct dischargers" into Boston Harbor).

- For several years, MassDEP has recognized that the tide gate separates two waterways. Page 18 of the Fact Sheet cites MassDEP's *Mystic River Watershed and Coastal Drainage Area 2004-2008 Water Quality Assessment Report* (Mar. 2010) ("*Mystic River Report*"), which designates "Sales Creek" as Basin MA71-12, and describes it in the same manner as the *MassDEP 2012 List*. See *Mystic River Report* at 36. The *Report* calls Sales Creek a "Class B" water, and not an ORW. The *Report* calls the waterway downstream of the tide gate "Belle Isle Inlet," and gives it a different basin number, MA71-14. That basin is classified as a Class SA/ORW. See *id.* at 37.
- As page 18 of the Fact Sheet admits, following publication of the *Mystic River Report*, MassDEP issued an "Errata Sheet," available at www.mass.gov/dep/water/resources/71er0610.htm. The Errata Sheet claims that the *Report's* classification of MA71-12 is incorrect. The Errata Sheet asserts that the Mass. WQS already had classified MA71-12 as "Class SA/ORW" because it was a "tributary" to Belle Isle Inlet. The Errata Sheet does not state who concluded that Sales Creek was a Class SA/ORW tributary to Sales Creek. The Errata Sheet goes on to admit that basin MA71-12 is "**separated from Belle Isle Inlet by a tidal gate and does not function as a tidal system. It is recommended that this waterbody be reclassified in the next revision of the [Mass. WQS] as a Class B/ORW.**"⁷ (Emphasis added.)
- In May 2008, EPA Region 1 (with the assistance of MassDEP) issued an administrative order to Suffolk Downs concerning its discharges to Sales Creek. The administrative order states that the Mass. WQS classified Sales Creek as a "Class B" waterway. See Findings of Violation and Order for Compliance, *In the Matter of Sterling Suffolk Racecourse, LLC*, EPA Region 1 Docket No. 08-015, ¶ 34 (May 2, 2008) (Appendix, Exhibit 6).

⁷ While the Errata Sheet's proposed designation of its basin MA71-12 as a Class B waterway appears to be correct, see 314 CMR 4.05(3)(b), the Errata Sheet gives no explanation for why MA71-12 would qualify as an ORW under the Mass. WQS. The ORW designation requires nomination as such. See 314 CMR 4.06(1)(d)(2). Table 15 does not answer this question, as it defines the Belle Isle Inlet ORW in terms of its "Class SA" waters. As explained above, Sales Creek upstream of the tidal gate cannot be a Class SA water, as it is not tidally influenced. When MassDEP designates an entire waterway as an ORW, regardless of its class, it lists the waterway without an associated class designation. See, for example, 314 CMR 4.06, Table 17 (designation of three "tributaries" to the Nissitissit River). Moreover, MassDEP designates ORWs "based on their outstanding socio-economic, recreational, ecological and/or aesthetic values." 314 CMR 4.04(3). As of January 2012, MassDEP had not assessed the uses or values of Sales Creek, see *MassDEP 2012 List* at 67, and so the Errata Sheet's suggestion that Sales Creek has qualified (or could qualify) for ORW designation is dubious.

Suffolk Downs has asked MassDEP to produce all records pertaining to any nomination of Sales Creek as an ORW, but has received no such records. See Appendix, Exhibit 2.

- In May 2011, Suffolk Downs filed an environmental notification form (“2011 ENF”) with the Commonwealth’s Secretary of Energy and Environmental Affairs for authorization of the process-wastewater control project built in 2011-12. See Suffolk Downs Environmental Notification Form, EEA No. 14747 (May 16, 2011) (Appendix, Exhibit 7). The 2011 ENF asked Suffolk Downs to identify ORWs on or within a half-mile radius of the project site. The 2011 ENF stated: “Sales Creek (a surface water body designated as Class B pursuant to the [Mass. WQS] drains through a tide gate into the coastal waters of Belle Isle Inlet, which is an ORW. The ORW status of Sales Creek upstream of the tide gate is uncertain.” *Id.* at 5-6. The 2011 ENF was circulated to several Commonwealth agencies, including MassDEP. No one (including MassDEP) disputed the description of Sales Creek and its status. See Certificate of the Secretary of Energy and Environmental Affairs on the Environmental Notification Form, EEA No. 14747 (June 22, 2011) (Appendix, Exhibit 8).
- In September 2012, MassDEP issued the ARD for the Draft Permit. Page 2 of the ARD states (emphases added):

[Suffolk Downs] is bisected by Sales Creek, a small (0.008 square mile) **fresh water body** classified as **Class B/ORW⁸** in the Massachusetts Surface Water Quality Standards (314 CMR 4.00) Sales Creek enters the facility through a culvert and surfaces in the infield of the racetrack **before being culverted again and draining (from the west side of Bennington Avenue) to Belle Island [sic] Inlet**, an outstanding resource marine water (ORMW)....

Page 5 of the ARD treats Sales Creek as separate from Belle Isle Inlet (emphasis added):

The MassDEP evaluated and developed a comprehensive list of the [Commonwealth’s] assessed waters and the most recent list was published in the *Massachusetts Year 2008 Integrated List of Waters*. **The Commonwealth has not assessed Sales Creek’s uses nor has a TMDL been developed for it. The Massachusetts Year 2008 Integrated List of Waters... identifies Winthrop Bay and Belle Isle Inlet (the closest water bodies to Sales Creek evaluated by MassDEP) as impaired....**

2.1.3. The Mass. WQS’s Class SA and ORW Standards Do Not Govern Sales Creek; Class B/High Quality Waters Standards Apply

The facts set forth above show that it is incorrect to interpret Table 15’s Class SA/ORW “tributaries” of Belle Isle Inlet as including Sales Creek. While the Errata Sheet recommends that the upstream portions of Sales Creek be “reclassified,” the evidence presented above shows that the Commonwealth never has classified Sales Creek under 314 CMR 4.06 in the first place.

314 CMR 4.06(4) provides that when 314 CMR 4.06 and its tables do not designate a waterway, such waters “are Class B, and presumed High Quality Waters for inland waters....” In other words, the “reclassification” described in the Errata Sheet

⁸ See the discussion of the ORW topic in note 7 above.

need not occur: Sales Creek (by virtue of 314 CMR 4.06(4)) is presumed to be Class B/High Quality Water.

2.2. The Fact Sheet Fails to Define the Regulated Facilities Consistently

The Fact Sheet employs multiple terms (“Suffolk,” “Suffolk Downs,” “CAFO,” the “facility,” “Production Area,” and “Non-Production Area”) to identify entities and areas that will be subject to the final NPDES permit. In doing so, the Fact Sheet leaves the impression that the permit will cover areas and activities that are not subject to the CWA or the Mass. WQS. See Fact Sheet at 6 (“The CWA’s NPDES program regulates the discharge of pollutants from *point sources* to *waters of the United States.*”) (emphases added); 314 CMR 4.03(1)(a) (Mass. WQS “limit or prohibit discharges of pollutants to *surface waters*”) (emphasis added).

The Consent Decree’s terms are more precise. The Consent Decree uses the terms “Suffolk” or “Suffolk Downs” only to identify the owner of the regulated facilities. See Appendix, Exhibit 1. The Consent Decree uses the term “Facility” to refer to all of the property and facilities owned by Suffolk Downs, regardless of whether they are regulated. Finally, the Consent Decree uses the terms “Production Area” and “Non-Production Area” to refer to the specific facilities that are subject to the Consent Decree. The Consent Decree also identifies the boundaries of the “Production Area” and “Non-Production Area” by reference to Figure 2 of the Nutrient & Stormwater Management Plan attached as Appendix A to the Consent Decree. That same figure (with handwritten changes added by the Agencies, some of which designate problematic testing locations, see Comments 3.4, 3.5.2 n.13, and 3.5.3 n.14) is Figure 1 to the Draft Permit.

The Draft Permit is more precise than the Fact Sheet. The Draft Permit uses only the terms “Suffolk” and “permittee” to refer to the owner of the regulated facilities, and relies mostly on the terms “Production Area” and “Non-Production Area” to describe the areas contributing to regulated point sources.⁹ The Draft Permit nevertheless does not expressly define “Production

⁹ The Draft Permit nevertheless contains several instances of loose terminology:

- Footnote 3 to the table that appears on page 3 of the Draft Permit, footnote 4 to the table that appears on page 4 of the Draft Permit, and footnote 4 to the table that appears on page 5 of the Draft Permit call for reporting data from a rain gauge to be located “at the CAFO....” The words “in the Production Area” should replace “at the CAFO” in all three footnotes.
- Parts I.A.11.a., b., c., e., f., and 1.A.16 of the Draft Permit refer to something called “Suffolk’s CAFO.” In each instance, “CAFO” or “Suffolk’s CAFO” should be “Production Area.”
- Part I.A.11.g. states: “This permit does not authorize discharges of pollutants from the Production Area of Suffolk’s CAFO....” The words “of Suffolk’s CAFO” are superfluous and should be deleted.
- Parts I.B.1.b(1), 1.B.1.b(5), and 1.B.1.b(7)(i) refer to “the CAFO’s Production Area....” “CAFO’s” is superfluous and should be deleted.
- Part I.B.1.b(2)(i) refers to “the CAFO’s designated washing areas located within the Production Area.” Part I.B.1.b(6)(i)(a) refers to “the CAFO’s process wastewater retention structure....” The words “the CAFO’s” are superfluous and should be deleted.
- Part I.B.1.b.(2)(iii) states: “Only track-supplied hoses may be used at the CAFO.” Part I.B.1.b(2)(vi) requires certain inspections while horses are stabled “at the CAFO until the completion of the CAFO’s annual post-season cleanup....” The words “in the Production Area” should replace “at the CAFO” in both sentences, and “Suffolk’s” should replace “the CAFO’s”.
- Part I.B.1.b.(3)(i) refers to “The CAFO’s mortality shed....” “Suffolk’s” should replace “The

Area” or “Non-Production Area.” Such areas should be defined as they are in the Consent Decree, solely by reference to Figure 1 to the Draft Permit. Part 2.D.1.a. similarly uses the term “permitted facility.” Part 1 of the Draft Permit should make it clear that the “permitted facility” refers only to the Production Area and the Non-Production Area.

2.3. The Fact Sheet Erroneously Describes Drainage and Flows

The Fact Sheet contains erroneous descriptions of the drainage areas and flows contributing to many of the outfalls identified in the Draft Permit. The Fact Sheet also ignores significant characteristics of discharges from those outfalls.¹⁰ These errors and omissions are best understood in the context of Part III.A.1, Table 1 of the Fact Sheet (Fact Sheet, pages 9-10).

2.3.1. NPDES Outfall 001

Table 1 describes this outfall as “Sediment basin drainage channel located on the northern bank of Sales Creek where Sales Creek flows above ground in the Track Area in-field. Discharge: overflow from Production Area wastewater storage pond.” Table 1 identifies Outfall 001 as being the same outfall as Suffolk PWP-1. The reference to PWP-1 is incorrect and should be removed from Table 1. Suffolk’s PWP-1 does not discharge to Sales Creek. See Affidavit of Kenneth Deshais (“Deshais Affidavit,” Appendix, Exhibit 9).

Instead, PWP-1 is at the end of a 30-inch pipe that discharges process wastewater from the Production Area to the Storage Pond.¹¹ See *id.* By contrast, Outfall 001 is a riprap slide that leads to a vegetated swale. See *id.* The swale connects to Sales Creek. See *id.*

As will be discussed in Comment 3.4 below, there is no evidence that Outfall 001 is reasonably likely to discharge to Sales Creek.

CAFO’s.”

- Part I.B.1.b.(4)(i)(a) refers to “process wastewater retention structures at the CAFO facility....” Parts I.B.1.b.(4)(ii) and b(5) refer to other practices when horses are stabled (or not) “at the CAFO....” Part I.B.1.b.(7)(i) refers to “the roofs of structures at the CAFO....” The words “in the Production Area” should replace “at the CAFO facility” and “at the CAFO”.
- Part I.B.1.b.(7)(ii) refers to the “CAFO’s process wastewater retention structure....” “Production Area’s” should replace “CAFO’s.”
- Part I.B.1.b.(7)(iv) requires inspections of “[g]utters and downspouts....” The words “on structures in the Production Area” should be inserted after “downspouts”.
- Parts I.B.1.b.(11)(v) and (xiv), and Parts I.E.3.b.(i) and (ii), refer to “the CAFO facility....” “Production Area” should replace “CAFO facility”.

¹⁰ A minor item appears on page 4 of the Fact Sheet, which refers to “contaminated process wastewater.” By definition, the CWA regulates all “process wastewater” as a pollutant, regardless of whether it is “contaminated.”

¹¹ A related minor item appears on page 8 of the Fact Sheet, where it asserts that MassDEP has issued a permit allowing Suffolk to discharge process wastewater to the “MWRA” sewer system. More precisely, MassDEP’s permit allows Suffolk to discharge process wastewater to sewers that the Boston Water & Sewer Commission operates. See Massachusetts Department of Environmental Protection, Sewer Connection Permit No. X251196 (Boston) (Aug. 1, 2012) (Appendix, Exhibit 10). Those sewers lead, in turn, to MWRA facilities. See *id.*

2.3.2. NPDES Outfall 002

Table 1 describes this outfall as “Sediment drainage swale located on the northern bank of Sales Creek (downstream of PWP-1) where Sales Creek flows above ground in the Track Area in-field. Discharge: Overflow from Production Area wastewater storage pond.” Table 1 identifies Outfall 002 as the same outfall as Suffolk PWP-2. The reference to PWP-2 is incorrect and should be removed from Table 1. Suffolk’s PWP-2 does not discharge to Sales Creek. See Deshais Affidavit. Instead, PWP-2 is at the end of an eighteen-inch pipe that discharges process wastewater from the Production Area to the Storage Pond. By contrast, Outfall 002 is a riprap slide that leads to a vegetated swale. The swale connects to Sales Creek. See *id.*

As will be discussed in Comment 3.4 below, there is no evidence that Outfall 002 is reasonably likely to discharge to Sales Creek.

2.3.3. NPDES Outfall 003

Table 1 describes this outfall as “Outfall (flow-through pit) located in the wetlands adjacent to Sales Creek.... Discharge: Production Area (roof runoff) stormwater.” As Suffolk Downs previously has disclosed to the Agencies, there is at least one drain line located outside of Suffolk’s property that contributes flows to a Suffolk-owned drain line that empties at Outfall 003. See Deshais Affidavit. Because Outfall 003 is submerged, it is impossible to tell whether Suffolk’s drain line, or off-site drains that connect to Suffolk’s line, pick up groundwater even during dry weather. See *id.* It is also likely that Suffolk’s drain is picking up groundwater from Suffolk’s property. See *id.* Nevertheless, the only “Production Area stormwater” that Suffolk contributes to the drain line leading to Outfall 003 is roof runoff. See *id.* Following the 2011-2012 construction, horses do not affect the discharges at Outfall 003. See *id.*

2.3.4. NPDES Outfall 004

Table 1 describes the discharge from this outfall as “Non-Production Area stormwater from the grandstand, paved track maintenance area and paved parking area.” Groundwater also infiltrates the drain line leading to this outfall. See Deshais Affidavit. Parts III.A.2. and IV.C.2.a. of the Fact Sheet erroneously state that prior to 2011-12, Outfall 004 discharged process wastewater and runoff from the racetrack. Process wastewater and racetrack runoff never have discharged through Outfall 004. See Deshais Affidavit. Horses never have had contact with any of the water that discharges at Outfall 004. See *id.*

2.3.5. NPDES Outfall 005

Table 1 notes that the sole discharge to Outfall 005 is “Production Area (roof runoff) stormwater.” There also appears to be groundwater infiltration to the line discharging at Outfall 005. See Deshais Affidavit. Horses have had no contact with that runoff since the 2011-2012 construction. See *id.* The discussion of Production-Area runoff in Part IV.B.3.iii of the Fact Sheet overlooks that fact.

2.3.6. NPDES Outfall 006

Table 1 acknowledges that Outfall 006 consists of multiple pipes located on the eastern bank of Sales Creek. Prior to Suffolk’s 2011-2012 construction activities, there

were two such pipes, an eight-inch line and a 24-inch line. See Deshais Affidavit. Both discharged to a tributary stream that passed through vegetated wetlands adjacent to the eastern bank of Sales Creek. See *id.* Outfall 006 was partially submerged, and received surface runoff from adjacent uplands. See *id.* Prior sampling at Outfall 006 has occurred in the mixing zone of the two pipes. See *id.*

Prior to construction in 2011-2012, the eight-inch pipe discharged road runoff from Tomasello Way and publically owned Revere Beach Parkway/Winthrop Avenue, as well as minor amounts of sheet flow originating from a small portion of the Production Area. See *id.* The 24-inch pipe discharged runoff from the Production Area as well as road runoff generated along Revere Beach Parkway/Winthrop Avenue and a portion of Washburn Avenue. See *id.* Road runoff entered the 24-inch pipe through multiple connections within the Suffolk Downs property. See *id.* Dry-weather observations of the discharges from the 24-inch pipe prior to 2011-12 suggest that groundwater also was infiltrating the pipe. See *id.*

The 2011-2012 construction did not change the characteristics of the immediate area around Outfall 006. The eight-inch pipe at Outfall 006 still continues to discharge runoff generated from Tomasello Way and Revere Beach Parkway/Winthrop Avenue. See *id.* The eight-inch pipe no longer receives any substantial sheet flows from the Production Area. See *id.* The 24-inch pipe discharges runoff from the aisle parking area and roadway on the north side of Suffolk Downs (an area now designated as Non-Production Area), but only if such runoff exceeds the infiltration capacity of three infiltration islands. See Fact Sheet at 13¹²; Deshais Affidavit. Any excess capacity discharges directly to the 24-inch drain line at Outfall 006, and never enters Suffolk's process-water diversion system. See *id.* The 24-inch pipe also receives roof runoff from certain buildings within the Production Area. The 24-inch pipe continues to discharge road runoff generated in Revere Beach Parkway/ Winthrop Avenue and a portion of Washburn Avenue. See *id.* As Suffolk's 2011-2012 construction did not replace the eight- or 24-inch lines (or an eighteen-inch line that is the principal connection to the 24-inch line), the eight- and 24-inch lines likely continue to discharge groundwater. See *id.*

Table 1 notes that the discharges at Outfall 006 are now "Production Area (roof runoff) and Non-Production Area (northern aisle parking and roadway) stormwater runoff." All Production Area runoff originates solely on roofs of buildings within the Production Area. Horses have had no contact with that runoff since the 2012 construction. See Deshais Affidavit. The discussion of Production-Area runoff in Part IV.B.3.iii of the Fact Sheet overlooks that fact.

2.3.7. NPDES Outfall 007

Table 1 asserts that the discharge at Outfall 007 includes "Non-Production Area runoff from the racetrack entrance, track maintenance areas, parking area and racetrack material stockpile area." The second sentence in the last paragraph of Part III.A.2.b of the Fact Sheet (page 14) erroneously suggests that the drainage area includes "a parking area west of the track maintenance area." As part of its 2011-2012 construction, Suffolk Downs substantially diverted the runoff from the parking area, located west of the fence that separates the track maintenance area from the parking area, away from the

¹² The last sentence of Part III.A.2.a.ii. of the Fact Sheet erroneously suggests that runoff that exceeds the capacity of the infiltration islands discharges to Outfall 006 "via the diversion system." Any excess capacity discharges directly to the 24-inch drain line, and never enters the process-water diversion system. See Deshais Affidavit.

track maintenance area. See Deshais Affidavit. The parking area's runoff no longer can reach Outfall 007. See *id.*

2.3.8. NPDES Outfall 008

2.3.9. NPDES Outfall 009

2.3.10. NPDES Outfall 010

While the Fact Sheet's descriptions of the locations of Outfalls 008, 009 and 010 are correct, the Fact Sheet describes their discharge as "Track Area industrial stormwater." That statement is only partially correct. Each of these outfalls drains a BMP sand filter. See Deshais Affidavit. The sand filter underdrains are reasonably likely to pick up groundwater, which in turn commingles with track runoff that has entered the sand filter. Outfalls 009 and 010 also are outlets for an underdrain system that is beneath the Storage Pond. See *id.*

2.3.11. NPDES Outfall 011

Table 1 erroneously describes Outfall 011 as "Sediment basin drainage swale located on the southeast side of Sales Creek where Sales Creek flows above ground in the Track Area in-field and towards Walley Street." There is no drainage swale near Outfall 011. Following construction, the outfall is a six-inch solid PVC pipe connected to the underdrain of the sand filter identified as BMP-5. See Deshais Affidavit. Prior to Suffolk's 2011-2012 construction activities, Outfall 011 consisted of a twelve-inch corrugated plastic pipe that connected to a concrete vault in the vicinity of BMP-5. The vault received runoff from the racetrack's drain system. Following construction in 2011-12, Outfall 011 discharges track runoff and any groundwater that enters BMP-5's underdrain. See *id.*

2.4. The Fact Sheet Ignores Permissible Dry-Weather Flows

While the Fact Sheet asserts that the NELG imposes a "no discharge" standard, even in dry weather (Fact Sheet, page 26), the Fact Sheet's later assertion that "Dry weather discharges from all outfalls...are prohibited" (*id.* at 27) suggests misapplication of the NELG. *None of the monitored outfalls is reasonably likely to result in a discharge of process water from the Production Area, even in dry weather.* See Deshais Affidavit. Moreover, as discussed in Comments 2.3.3, 2.3.4, and 2.3.6 above, Outfalls 003, 004 and 006 show signs of groundwater infiltration from areas completely outside of the Production Area (and, in the case of Outfalls 003 and 006, even outside of Suffolk Downs's property). As discussed in Comments 2.3.8 through 2.3.11 above, the BMPs in the infield of the Suffolk racetrack are similarly likely to discharge groundwater. The Draft Permit should acknowledge that the NELG has no bearing on such discharges.

2.5. Additional Data is Needed About Discharges of TSS, Bacteria and Aluminum

The Fact Sheet frequently states that at the time the Agencies developed the Draft Permit, EPA had not received "any" discharge status report data from Suffolk Downs. Suffolk Downs does not know when the Agencies prepared the Draft Permit, but Suffolk Downs has submitted discharge sampling and other status reports concerning its Production Area and Non-Production activities at least twice prior to issuance of Joint Public Notice. See Quarterly Compliance Report, July 1, 2012 through September 30, 2012, *U.S. v. Sterling Suffolk*

Racecourse, LLC, Docket No. 12-cv-11556 (Oct. 30, 2012); Compliance Report, October 1, 2012 through December 31, 2012, *U.S. v. Sterling Suffolk Racecourse, LLC*, Docket No. 12-cv-11556 (Jan. 30, 2013).

While Suffolk Downs believes that the data it has submitted so far to the Agencies permits them to draw adequate conclusions regarding the likelihood of the discharge of pollutants from certain point sources, see Comment 3.4 below, as well as the proper testing parameters for other point sources, see Comments 3.4, 3.5, 3.10 and 3.12 below, Suffolk Downs agrees that additional testing data is needed before the Agencies properly may make more permanent decisions regarding the scope of testing at Suffolk's outfalls. Suffolk Downs also proposes that the Permit include a provision for "tiered monitoring." Section 8.1.3 of the *NPDES Permit Writers' Manual* (EPA-833-K-10-001) allows tiered monitoring where additional testing data may show that less (or more) frequent monitoring is appropriate. "This step-wise approach could lead to lower monitoring costs for permittees while still providing the data needed to demonstrate compliance with effluent limitations." Suffolk Downs anticipates that additional data will show that both wet- and dry-weather sampling, at numerous outfalls and for numerous parameters, likely could be reduced without compromising compliance.

2.6. The Fact Sheet Incorrectly Calculates Sales Creek's Available Dilution

The Fact Sheet's discussion of available dilution (page 20) contains several errors. First, the Fact Sheet asserts that the Mass. WQS establishes the hydrologic condition under which any water-quality criteria must be applied. The Fact Sheet goes on to cite 314 CMR 4.03(3)(a) as the applicable hydrologic standard. The Fact Sheet misstates that standard. Section 4.03(3)(a) states in pertinent part (emphasis added):

For rivers and streams, the lowest flow condition **at and above which aquatic life criteria must be applied** is the lowest mean flow for seven consecutive days to be expected once in ten years.

Second, the Fact Sheet claims, without reference to any standard, that water quality-based limits "are then based on a dilution factor calculated using the permitted flow of the facility and the low flow condition in the receiving water." That statement overlooks the fact that Suffolk Downs's discharges are largely non-continuous. See 40 CFR § 122.2 (defining "continuous discharge"); *id.* at § 122.45(d) and (e) (distinguishing between continuous and non-continuous discharge). Following its 2011-2012 construction, Suffolk Downs's "continuous" discharges are limited to relatively low amounts of groundwater, and no process wastewater whatsoever. See *Deshais Affidavit*. Stormwater comprises the bulk of its non-continuous discharges. Such discharges occur, by definition, during storm events. Such storm events are unlikely to occur simultaneously with a low-flow condition in Sales Creek. See *id.*

Third, the data that appears on page 20 of the Fact Sheet is incorrect. The flow from the Production Area following the 2011-2012 construction is 245,200 cubic feet per month (0.0603 MGD). See Appendix, Exhibit 4. The Fact Sheet recognizes that Suffolk Downs has diverted a substantial amount of that flow to its process-wastewater storage system. The flows that are not diverted to that system – those from rooftops of buildings in the Production Area – are approximately 98,200 cubic feet per month (0.02411 MGD). See *id.*

The Fact Sheet's dilution calculations thus should be revised to compare apples to apples: *either* one must compare Sales Creek's low-flow condition with Suffolk Downs's permitted flows *during low-flow periods* (that is, its dry-weather groundwater discharges) *or*, if

one is intent on examining Sales Creek's potential to dilute the entirety of Suffolk Downs's permitted undiverted flows, one must use comparable, "stormy" conditions on Sales Creek.

2.7. The Fact Sheet Erroneously Characterizes Suffolk Downs's Ability to Seek Approval of Land Application of Process Wastewater

Two sections of the Fact Sheet (see pages 4 and 40) erroneously suggest that Suffolk Downs has decided not to apply wastewater or manure to any portions of its property. Suffolk Downs has made no such decision. In fact, ¶ 14(d) of the Consent Decree and § 4.2 of the NSMP contemplate that, provided that it proceeds in accordance with all applicable regulatory requirements, Suffolk Downs may investigate and apply for permission to use its process water to irrigate the track's grassy infield. Page 28 of the Fact Sheet appears to contemplate that option. The Agencies should remove any contrary statements from the Fact Sheet.

2.8. The Fact Sheet Does Not Describe Post-Construction Grades Correctly

Page 11 of the Fact Sheet states that the "perimeter of the Production Area is graded and/or bermed to prevent process wastewater from exiting the Production Area and to keep non-Production Area stormwater from flowing into the Production Area." This statement is incorrect. EPA's regulations at 40 CFR 122.42.(e)(1)(iii) require CAFO permits to "[e]nsure that clean water is diverted, *as appropriate*, from the production area." (Emphasis added.) The current grading and berms around the Production Area substantially separate the Production Area from the Non-Production Area, and substantially prevent flows from travelling from one area to the other. See Deshais Affidavit. The Draft Permit similarly should require diversion measures "as appropriate."

2.9. The Fact Sheet Should Use As-Built Data for the Storage Pond

Page 11 of the Fact Sheet reports that the total capacity of the Storage Pond is 2,296,520 gallons, with a total capacity of 307,000 cubic feet. As built, the Storage Pond holds approximately 2,176,800 gallons, with a total capacity of approximately 291,000 cubic feet. See Appendix, Exhibit 4. As built, the Storage Pond is capable of retaining the expected runoff from a 50-year, 24-hour rain event within the Production Area. See *id.*

3. Comments on the Draft Permit

3.1. The Permit Should Allow Discharges to Sales Creek "and Adjacent Wetlands"

As discussed in Comments 2.3.3 and 2.3.6 above, Outfalls 003 and 006 do not discharge to Sales Creek. Instead, as Table 1 of the Fact Sheet notes, Outfall 003 discharges into a "flow-through pit" in "the wetlands adjacent to Sales Creek...." Outfall 006 discharges to a stream and wetlands that lead to Sales Creek. The Permit should reflect those facts.

3.2. The Permit Should Allow Discharges From the Storage Pond In Accordance With the NELG

Pages 25-27 of the Fact Sheet recognize that Suffolk Downs has designed the Storage Pond in compliance with the NELG, and that overflow conditions are likely to comply with the WQS as well. As such, the NELG permits Suffolk Downs to discharge overflow from the Storage Pond as a result of either "chronic or catastrophic" events. Part I.A.11.b of the Draft Permit nevertheless states that there shall be "no discharge from Suffolk's CAFO of rainfall

runoff from manure or litter or feed storage piles, dumpsters, or other storage devices into the waters of the United States.” The end of this sentence should be amended to include the words “except from Outfalls 001 and 002,” the Storage Pond’s authorized overflow points.

3.3. The Permit Should Allow Dry-Weather Discharges From Outfalls 003 and 006

Part I.A.11.g states: “This permit does not authorize discharges of pollutants from the Production Area of Suffolk’s CAFO to surface waters during dry weather conditions and such dry weather discharges are prohibited.” For the reasons discussed in Comments 2.3.3 and 2.3.6 above, Outfalls 003 and 006 are likely to discharge groundwater (but not process wastewater) during dry weather. These Outfalls also receive contributions from sources outside of Suffolk Downs. For these reasons, Part I.A.11.g should be omitted.

3.4. The Permit Should Not Require Water-Quality Testing of Outfalls 001 and 002

The CWA regulations do not require testing for testing’s sake. Instead, monitoring and testing is only a means of “provid[ing] for and assur[ing] compliance with all applicable requirements of the CWA and regulations.” 40 C.F.R. § 122.43(a); see also *id.* at § 122.44(i)(1) (requiring, when applicable, monitoring requirements “[t]o assure compliance with permit limitations”). Unless otherwise set forth in the CWA or its regulations, monitoring conditions are to be established “as required on a case-by-case basis....” *Id.* The rationale for any sampling or monitoring condition must be set forth fully in the record. See, for example, *In re Beckman Prod. Servs.*, 8 E.A.D. 302, 311 (E.A.B. 1999) (remanding regional decision because it insufficiently explained its rationale for required testing).

The Fact Sheet acknowledges (see page 9) that the Storage Pond is designed to hold the process wastewater generated within the Production Area “from all storm events smaller than the 50-year, 24-hour[] rainfall event, which significantly exceeds the 25-year, 24-hour rainfall event required by the Large Horse CAFO NELG.” The Fact Sheet further states that Outfalls 001 and 002 are likely to carry discharges from the Storage Pond to “existing drainage swales” (and from there into Sales Creek) only during “extreme rainfall events exceeding the capacity of the [S]torage [P]ond.”

By definition, there is no reasonable potential for Outfalls 001 and 002 to discharge pollutants to Sales Creek. The Permit should not require Suffolk Downs to sample those outfalls. Should the Permit require testing of the discharges from Outfalls 001 and 002 (in the unlikely event that there should be a discharge), the Permit should requiring sampling at only one of the two locations (see Comment 3.5.1 below), and only then at the top of the overflow structures, before they commingle with other runoff in the drainage swales to which these outfalls discharge.

The Permit also should not require testing of oil and grease from Outfalls 001 and 002 (Part I.A.1.b, table). The only oil and grease testing that the Draft Permit recommends is for Outfalls 001 and 002. Such testing is unnecessary, as there is no reasonable potential for discharge of oil and grease from Outfalls 001 and 002. See *Deshais Affidavit*. The NSMP restricts the use of vehicles in the Production Area. Those restrictions have succeeded in preventing oil and grease from ending up in Suffolk Downs’s process wastewater. Since the summer of 2012, Suffolk Downs has been discharging to the Boston Water and Sewer Commission’s sewer system, which in turn discharges to the MWRA system, process

wastewater collected in the Storage Pond. Suffolk Downs has tested those discharges monthly. Each sample has had no detectable amounts of oil and grease. See *id.* The Permit should excuse Suffolk Downs from any further oil and grease sampling.

3.5. The Permit Should Not Require Duplicative Sampling

Section § 122.48(b) of the CWA regulations provides that the purpose of monitoring is “to yield data which are representative of the monitored activity....” Part IV.C.2.a of the Fact Sheet reports that the Agencies reviewed the MSGP to determine appropriate technology-based limits for the draft permit. The MSGP recognizes (consistent with § 122.48(b)) that in certain cases, monitoring of a single outfall may be sufficient to provide a representative sample of a facility’s industrial discharges. Section 6.1.1 of the MSGP provides that if the facility has two or more “substantially identical” outfalls, the permitting agency may allow the permittee to monitor the effluent of just one outfall, and report those results for substantially identical outfalls. A “substantially identical” outfall under § 6.1.1 is one that the permittee believes “discharge[s] substantially identical effluents based on the similarities of the general industrial activities and control measures, exposed materials that may significantly contribute pollutants to stormwater and runoff coefficients of their drainage areas.”

The Draft Permit requires sampling at all eleven outfalls identified in the Draft Permit. Several are “substantially identical,” or receive “substantially identical” discharges.

3.5.1. Outfalls 001 and 002 are Substantially Identical.

While Suffolk Downs has requested that it be excused from sampling Outfalls 001 and 002 (see Comment 3.4 above), page 9 of the Fact Sheet acknowledges that both Outfalls would (in extreme 50-year rain events) discharge the same process wastewater from the Storage Pond. Thus, one outfall is “substantially identical” to the other. It is not necessary to sample both locations in order to obtain a representative sample of any effluent being discharged. Should the Agencies require Suffolk Downs to monitor Outfalls 001 and 002, the Agencies should limit any sampling to Outfall 001, at the location identified in Comment 3.4.

3.5.2. Roof Runoff Contributed to Outfalls 003 and 006 Is Substantially Identical to the Discharges from Outfall 005.

Following Suffolk’s 2011-2012 construction program, dedicated drains that solely collect roof runoff from the Production Area discharge through three outfalls, Outfalls 003, 005 and 006. See Deshais Affidavit. Roof runoff discharged through Outfall 003 commingles with groundwater and apparent offsite sources from the Washburn Avenue-area outside of Suffolk Downs. Roof runoff discharged through Outfall 006 commingles with groundwater, discharges from the northern drive-aisle’s BMPs, and drainage from Revere Beach Parkway/Winthrop Avenue (again, outside of Suffolk Downs). By contrast, a new drain system that includes only roof runoff and groundwater from the Production Area, water that has never been in contact with horses, discharges through Outfall 005. Since the discharge of Outfall 005 is substantially identical to the roof runoff contributed to Outfalls 003 and 006, the Permit should not require Suffolk Downs to sample roof runoff from any location other than the end of the pipe at Outfall 005.¹³

¹³

Should the Permit require sampling at Outfalls 003 and 006, Outfall 003 should be tested at one

3.5.3. Outfalls 008, 009, 010 and 011 are Substantially Identical.

Outfalls 008, 009 and 010 are located in drainage swales at the outlets of three BMPs located in the infield of Suffolk Downs's track. They each receive, or have the potential to receive, the same effluents: discharges from the sand filter underdrain, sand filter overflow, and track runoff that overflows the weir of the sand filter diversion structure. Outfalls 009 and 010 also receive discharge from the storage pond underdrains that contain the same effluents. The watersheds for these outfalls have the same runoff characteristics, and Suffolk Downs has designed each to treat proportional amounts of runoff from the track. See *id.*

Outfall 011 is different from Outfall 008 only to the extent it does not lead to a drainage swale and is different from Outfall 009 and 010 to extent it does not discharge to a drainage swale or receive discharges from the Storage Pond underdrains. The BMP underdrain that discharges through Outfall 011 functions the same as the other sand-filter underdrains. Outfall 011 should thus discharge substantially identical effluent as Outfalls 008, 009 and 010. The Permit thus should allow Suffolk Downs to sample only one of these four outfalls, preferably Outfall 011.

3.6. The Permit Should Allow Suffolk Downs to Monitor and Test Its Contributions to Outfalls 003 and 006 Before Those Contributions Commingle With Off-site or Unregulated Flows.

Section 6.1.2 of the MSGP provides that “where discharges authorized under the permit comingle with discharges not authorized under the permit, sampling of the authorized discharges must be performed at a point before they mix with other waste streams, to the extent practicable.”

As described in Comments 2.3.3 and 2.3.6, offsite waste streams contribute to the flows at Outfalls 003 and 006. Moreover, as the Table 1 of the Fact Sheet notes, Outfall 003 discharges at a “flow-through pit[] located in the wetlands....” The end of the pipe is buried beneath that pit. Discharges from the pit diffuse through heavy vegetation.¹⁴ See Deshais Affidavit. The pit also collects stormwater runoff present in the wetlands and adjacent uplands. See *id.* The discharge point for Outfall 006 similarly is partially submerged, and receives surface runoff from adjacent uplands. It thus is impossible at the locations identified in the Draft Permit as Outfalls 003 and 006¹⁵ to distinguish permitted discharges from Suffolk Downs from offsite flows. See *id.*

Some of the offsite discharges may be separately regulated under the Small MS4

of the downspouts that contribute to Outfall 003, and Outfall 006 should be sampled at DMH-8. Each proposed location samples authorized discharges before they mix with other discharge streams. See Deshais Affidavit; see also MSGP, Part 6.1.2.

¹⁴ The elevations of the drain line and the flow-through pit at Outfall 003 (which is approximately three feet deep) cause the drain pipe to surcharge. See Deshais Affidavit. Discharge occurs at Outfall 003 as hydraulic head builds in the drain line and effluent percolates through the soil. See *id.*

¹⁵ See Part I.A.1.b, table footnotes 1 & 4; Part I.A.2.a., table footnotes 1 & 5; Part I.A.3, table footnotes 1 & 3. While Suffolk Downs believes that sampling from Outfall 005 should suffice for sampling at Outfalls 003 and 006, see Comment 3.5.2, should the Agencies require sampling at Outfalls 003 and 006, the Permit should use the locations recommended in note 13 above.

General Permit applicable to the MassDCR (which is responsible for operation and maintenance of Revere Beach Parkway and portions of Winthrop Avenue) and the City of Revere. In a Notice of Intent dated June 2, 2003, the City of Revere stated that it operated seven outfalls to Sales Creek. See City of Revere, NPDES Stormwater Permit Notice of Intent for Discharges from MS4s (June 2, 2003) (Appendix, Exhibit 11). Suffolk Downs has not yet identified the outfalls described in the NOI.¹⁶ The uncertain regulatory status of the off-site contributors to the discharges at Outfalls 003 and 006, coupled with the certainty that such flows do not consist of process wastewater, further counsels against requiring monitoring and testing at Outfalls 003 and 006 as identified in the Draft Permit.

3.7. The Permit Should Modify its Definition of “Dry Weather”

Part I.A.3 of the Draft Permit requires monitoring of all outfalls during “dry weather.” Footnote 2 of the table on Page 7 of the Draft Permit defines “dry weather” as “any time when there is no precipitation and no snow melt, and is at least 24 hours after the end of a rainfall event that was greater than 0.1 inches in magnitude.” This definition of “dry weather” contradicts the Draft Permit’s definition of “wet weather,” which consistently relies on a 72-hour gap from a greater than 0.1 inch rainfall event. See Part I.A.2.a, table footnote 2; Part I.A.2.b., table footnote 2. The NPDES permit that the Agencies issued to P.J. Keating Company in September 2007 (NPDES Permit No. MA0029297) for a Class B receiving water has the same 72-hour definition of “wet weather” as the Draft Permit, but defines “dry weather” as “a period of no less than 72 hours in which no measurable precipitation occurs.” *Id.* at 4.¹⁷ Given the persistent groundwater discharges at some of Suffolk Downs’s outfalls, the Permit should use a 72-hour “dry weather” test, to correspond to the Draft Permit’s 72-hour “wet weather” test.

3.8. Wet-Weather Waiting Times Should Include Snow Melt

As the Draft Permit’s definition of “dry weather” recognizes, snow melt at Suffolk Downs can generate runoff similar to a 0.1 inch rain event. The Draft Permit’s “wet weather” definitions (*see, for example*, Part I.A.2.a. table footnote 2; Part I.A.2.b. table footnote 2) should include snow melt in tolling the 72-hour waiting period.

¹⁶ Suffolk’s potential lack of control over offsite contributors to Outfalls 003 and 006 makes it difficult, if not impossible, for Suffolk to assure compliance with conditions such as those found in Parts I.A.4, 5, 6, and 7, which address effluent characteristics, as opposed to conditions such as those found in Parts I.A.9, 10, and 11, which regulate Suffolk Downs’s conduct.

¹⁷ Most NPDES permits recently issued by the Agencies for discharges to Class B receiving waters do not define “dry weather.” Of the four permits besides P.J. Keating Co. that do, two use a 48-hour no-precipitation rule for “dry weather,” but those permits either do not have a corresponding “wet weather” definition. See Lowell Cogeneration Company LP, NPDES Permit No. MA0031071, page 5, footnote 1 (Dec. 2008); Texas Instruments, Inc., NPDES Permit No. MA0001791, pages 2-3, 5-6 (Oct. 2010). Another uses a 48-hour dry weather definition with a corresponding 48-hour wet-weather definition. See St. Gobain Abrasives, Inc., NPDES Permit No. MA0000817, page 7, footnote 1 (Sept. 2009). The permit issued to the Massachusetts Bay Transportation Authority, NPDES Permit No. MA0028941 (Apr. 2010) – which contains a 72-hour wet-weather definition, *see id.* at page 4, footnote 2 – uses a 48-hour dry-weather definition only for purposes of designating when the permittees are to conduct annual acute toxicity tests. See *id.* at page 5, footnote 8.

3.9. The Permit Should Require Only Monthly Dry-Weather Sampling of Outfalls 003, 004 and 006, and Quarterly Sampling (With Phase-Out) of Outfalls 008, 009, 010, and 011.

As noted in Comment 2.4 above, dry-weather discharges of groundwater – discharges having nothing to do with the Production Area or industrial activities within the Non-Production Area -- are likely to be seen at Outfalls 003, 004, 006, 008, 009, 010 and 011. Part I.A.3 proposes testing these outfalls for each discharge event. The only other recent NPDES permits for Class B receiving waters that specifically address dry-weather discharges of groundwater allow monthly testing. See Texas Instruments at 2, 5; St. Gobain Abrasives at 2-3. The Draft Permit and Fact Sheet offer no reason for requiring testing for every discharge event, other than the assertion that the NELG prohibits all dry-weather discharges. As explained in Comment 2.4, the NELG does not apply to discharges arising outside of the Production Area or runoff from the Production Area that never comes in contact with animals, manure, feed or bedding materials.

Monthly testing of Outfalls 003, 004 and 006 will adequately assure compliance with the Permit's requirements. See Deshais Affidavit. As for Outfalls 008, 009, 010 and 011, testing should be required only quarterly. Page 31 of the Fact Sheet asserts that the discharges from these locations are similar to those of the sand- and gravel-mining industries, and suggests that the TSS benchmarks for that industry that are set forth in the MSGP are appropriate for Outfalls 008, 009, 010 and 011. Part 6.2 of the MSGP requires permittees to perform benchmark monitoring only on a quarterly basis. Part 6.2.1.2 of the MSGP further provides that (a) if the average of the first four samples does not exceed the benchmark, the permittee need not sample further; and (b) if the average exceeds the benchmark, sampling must continue until the permittee attains the benchmark limit. The Permit should apply to Outfalls 008, 009, 010 and 011 all applicable provisions of Part 6.2 of the MSGP.

3.10. Dry-Weather Sampling Parameters for Outfalls 008, 009, 010 and 011 Should Be Consistent With Wet-Weather Parameters.

According to Part I.A.2.b of the Draft Permit, the pollutants of concern for Outfalls 008, 009, 010 and 011 – all of which lie outside of the Production Area -- are pH and TSS. By contrast, Part I.A.3 proposes to have Suffolk Downs sample Outfalls 008, 009, 010, and 011 in dry weather for not just pH and TSS, but also aluminum, fecal coliform, E. coli, total phosphorous and nitrogen-ammonia. Neither the Fact Sheet nor the Draft Permit explains why these Non-Production Area outfalls should be sampled in dry weather for parameters that the Draft Permit otherwise ignores.

3.11. Sampling of Discharges Should Be Limited to Normal Business Hours

Parts I.A.1.b and 2.a require sampling during “wet weather conditions,” and further require that the permittee sample in accordance with 40 CFR Part 136. Table II of 40 CFR § 136.3 imposes a maximum 48-hour hold time for BOD₅ samples and a six-hour hold time for bacteria. In light of these holding requirements, the Permit should limit sampling to normal weekday business hours. Suffolk Downs does not continuously staff its facility with personnel who can perform the required testing at all hours and ensure delivery to a certified laboratory. See Deshais Affidavit. Activities in the Production and Non-Production Areas largely occur during normal business hours. The Permit is unlikely to achieve a higher level of compliance by requiring wet-weather testing outside of normal weekday business hours. See *id.* Wet-weather testing thus should be limited to normal weekday business hours.

3.12. The Permit Should Not Require pH Testing.

The Draft Permit requires pH testing from every outfall, and imposes discharge limits of 6.5 to 8.3. Such testing is unnecessary. The only sources of the discharges from each of the regulated outfalls are process wastewater (in extreme events), stormwater and groundwater. The latter sources do not result from any “industrial” process. See *id.* As for Suffolk Downs’s process wastewater, Suffolk Downs’s testing of its discharges to the MWRA show that the pH of those discharges ranges between 6.8 and 7.95, well within the proposed limits. See *id.* (Page 34 of the Fact Sheet notes that even before Suffolk’s 2011-12 construction, Suffolk’s discharges ranged between 6.5 and 7.8.) Additional pH testing will not achieve any greater permit compliance. See *Deshais Affidavit*. The Permit should excuse Suffolk Downs from further pH testing.

3.13. The Permit Should Allow Partial Closure of CAFO-Related Facilities

Paragraph 91 of the Consent Decree permits Suffolk Downs, upon approval by EPA, to close portions of the Production Area and remove the closed portions from the Consent Decree’s Production-Area restrictions. Parts I.A.11.e and I.A.13.b(1) of the Draft Permit prohibit, however, the “abandonment” of manure, litter or process-wastewater storage and handling structures, even if adequate storage and handling structures remain in those portions of the Production Area that remain open. The Permit should (a) replace the words “shall be abandoned at Suffolk’s CAFO” in Part I.A.11.e with “in the Production Area shall be abandoned except in accordance with the terms of this Permit”; and (b) insert the words “except in accordance with the terms of this Permit” at the end of the first sentence of Part I.A.13.b(1).

3.14. The Permit Should Approve Minor Amendments to NSMP

In light of its operational experience following its 2011-12 construction, Suffolk Downs proposes the following modifications to its NSMP. Suffolk Downs will be submitting these proposed amendments separately to EPA enforcement personnel pursuant to the terms of the Consent Decree. (In each bullet below, Suffolk Downs presents the Draft Permit’s reference to the NSMP requirement, followed the reference in the NSMP to the same requirement.)

- Part I.B.1.b(2)(iii) (NSMP § 3.2(3)): The words “track-supplied” should be changed to “track-approved.” “Track-approved” hoses work as well as “track-supplied” hoses.
- Part I.B.1.b(4)(c) (NSMP § 3.4.1, item 3): There are ten parking spaces next to an office trailer within the Production Area that serves as a medical clinic. Suffolk long has designated those parking spaces for disabled persons having properly licensed vehicles. Part I.B.4(c) proposes to allow only those vehicles associated with “veterinary services or track operations” to park within the Production Area. Suffolk’s 2011-2012 improvements greatly reduce the risk that such vehicles will pollute Sales Creek. Post-construction sampling bears this out. See Comment 3.4 above. The first sentence of Part I.B.4(c) thus should be revised as follows: “Except for those vehicles associated with veterinary services or track operations, emergency vehicles, or those vehicles authorized to park in designated disabled parking zones, vehicles may not be parked within the Production Area except during short-term deliveries.”
- Part I.B.1.b(6)(i)(b)-(d) (NSMP § 7.1.1): The Draft Permit requires installation and observation of a “depth marker” in the Storage Pond. EPA’s regulations at

40 CFR § 412.37(a)(1)(iii) require only a marker that identifies a storage pond's minimum capacity to contain the "required production area runoff..." Suffolk Downs has installed a gauge on the Storage Pond's inlet-control structure that indicates the Storage Pond's depth. See Deshais Affidavit. That gauge permits Suffolk Downs to determine whether the Pond has the requisite minimum capacity. See *id.* The words "or other gauge" should be inserted in Part I.B.1.b(6) after when the words "depth marker" appear.

- Part I.B.1.b(7)(iii) and (iv) (NSMP § 7.2, second and third bullets): The NSMP currently calls for "weekly" inspections of the perimeter of the Production Area and all Production-Area gutters and downspouts during rain events in order to assure that all such features operated properly post-construction. Post-construction wet-weather inspections have confirmed that those features operate as designed. The only purpose of additional inspections is to identify maintenance needs. There is nothing in the CWA regulations that requires identification of such needs on a weekly basis. Inspections should be required only monthly.
- Part I.B.1.b(7)(iii) and (iv) (NSMP § 7.2, second and third bullets): The NSMP currently calls for inspections of the perimeter of the Production Area and all Production-Area gutters and downspouts during "dry weather." Dry-weather inspections serve no purpose: one needs rain in order to detect the need to maintain the perimeter, gutters and downspouts. Inspections should be required only during wet weather.

3.15. Other Minor Modifications to Draft Permit

- In order to be consistent with the NSMP, the words "all water lines" in Part I.B.1.b.(2)(vi) of the Draft Permit should be replaced with "above ground water lines".
- For the reasons set forth in Comment 2.9 above, (a) the words "as appropriate" should be inserted after "isolated" in the first sentence of Part I.B.1.b.(7)(i) of the Draft Permit; and (b) the words "to determine whether inappropriate amounts of process wastewater are exiting the Production Area and whether inappropriate amounts of stormwater from outside the Production Area are entering the Production Area" should replace "to verify that process wastewater is not exiting the Production Area and stormwater originating from outside the Production Area is not entering the Production Area" in Part I.B.1.b.(7)(iii) of the Draft Permit.
- The words "above ground" should be inserted before "Production Area" in the first sentence of Part I.B.1.b(7)(v). As page 7 of the Fact Sheet notes, some of Suffolk Downs's stormwater-diversion devices and facilities are underground, and cannot be easily inspected visually.